SANDANADASS LAWRANCE

v.

TEOH AH HWA

HIGH COURT MALAYA, ALOR SETAR
BALIA YUSOF JC
[CIVIL APPEAL NO: 11-18-2001 (2)]
25 JULY 2002

CIVIL PROCEDURE: *Appeal - Appeal to High Court from subordinate courts - Notice of appeal - Filing of two notices of appeal - Service effected one month after decision of learned magistrate - Whether an irregularity - Whether curable - Subordinate Courts Rules 1980, O. 49 rr. 2(3), 2(6) - Rules of High Court 1980, O. 2 r. 1*

CIVIL PROCEDURE: *Appeal - Appeal to High Court from subordinate courts - Memorandum and record of appeal - Draft order in appeal record - Whether fatal - Whether could be rectified by supplementary record of appeal - Contradiction - Contradiction between notice of appeal and memorandum of appeal - Whether must lead to dismissal of appeal - Whether inconsequential - Subordinate Courts Rules 1980, O. 49 r. 3A(1)(d) - Rules of High Court 1980, O. 2 r. 1*

The appellant had appealed against the decision of the learned magistrate dismissing his claim in a road accident matter. Before the learned judge, the respondent raised a preliminary objection that the appeal ought to be dismissed on the grounds that: (i) the appellant had filed and served two notices of appeal; (ii) the said notices of appeal were flawed as the first notice was undated while the second was served out of time; (iii) the record of appeal contained only a draft order and not a sealed copy of the judgment; (iv) the supplementary appeal record was filed out of time and without leave; and (vi) there was contradiction between the notice of appeal and the memorandum of appeal, in that the former had appealed against the whole decision of the learned magistrate while the latter had confined the appeal to the issue of liability. The question that arose was whether the respondent's contentions herein had raised serious and fundamental flaws in the appeal process such as to merit a summary dismissal of the appeal.

Held:

[1] The notice of appeal serves as a notice to the respondent that an appeal is pending. In the instant case, by the service of the first notice of appeal, the respondent was fully informed and made aware of the fact. The respondent was thus not caught unaware and not in any way prejudiced. As a matter of fact, the respondent was subsequently served with another notice although out of time. (pp 955 c)

[2] The case of *Lee Lan v. Lim Yoon Long & Ors* ought to be distinguished as the notice of appeal in that case was never served on the party, and there was therefore nothing to bring the appeal into existence. So also the case of *Soh Keng Hian v. American International Assurance Co Ltd*, where the notice of appeal had not likewise been served on the respondent. (pp 955 d-h)

[3] The irregularity in the notice of appeal herein is not a fundamental defect in procedure and is curable under O. 2 r. 1 Rules of the High Court 1980. It follows that the respondent's objection in this respect must fail. (p 956 c)

[4] As for the appeal record, it is to be noted that the appellant had filed a supplementary appeal record on 27 November 2001 enclosing the sealed copy of the order. The only difference between the sealed copy of the order and that of the draft order in the impugned appeal record was the presence of the court's seal and the registrar's signature. This being the case, this court is unable to see how the said draft order could have prejudiced the respondent. In any case, the appellant, by filing the supplementary appeal record, has taken the necessary steps to remedy the appeal record. Further, under Arahan Amalan no. 2 Tahun 1998, there was no necessity to apply for leave to file a supplementary appeal record. (p 958 d-h)

[5] The contradiction between the notice of appeal and the memorandum of appeal is not of such a nature as to cause prejudice to the respondent. This is because, under no circumstance at all can the issue of quantum be left untouched or unaffected if the liability of the parties to the appeal is subsequently altered or apportioned by the court. In such a situation, it makes no difference whether the issue of quantum is pleaded or not in the memorandum of appeal. (p 960 e)

[Preliminary objections dismissed; hearing to proceed on merits.]

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd & Ors [2000] 2 CLJ 473 CA ***(refd)***

Harkness v. Bell's Asbestos and Engineering Ltd [1976] 2 QB 729 ***(refd)***

Lee Lan v. Lim Yoon Loy & Ors [1991] 3 CLJ 2393; [1991] 1 CLJ (Rep) 251 SC ***(dist)***

Metroinvest Anstalt & Ors v. Commercial Union Assurance Co Plc [1985] 2 All ER 318 ***(refd)***

Peggy Mavis Moreira & Anor v. Manivail Parasamy [2001] 2 CLJ 264 CA ***(dist)***

Ratnam v. Cumarasamy & Anor [1965] 1 MLJ 228 ***(refd)***

Re CHS [2001] 8 CLJ 653 HC ***(refd)***

Sii Toh Sing v. Hung Ming Chung [2000] 2 CLJ 48 HC ***(refd)***

Soh Keng Hian v. American International Co Ltd [1996] 2 CLJ 449 CA ***(dist)***

Syarikat Telekom Malaysia v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 SC ***(refd)***

Vincent Tan See Yin v. Noone & Co & Anor [1995] 2 CLJ 195 SC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 76

Rules of the High Court 1980, O. 2 r. 1

Subordinate Courts Rules 1980, O. 49 rr. 2(3), (6), 3A(1)(d)

For the appellant - M/s Sandu & Assoc

For the respondent - M/s Hoe & Ahmad Zaki

Reported by WA Sharif

JUDGMENT

Balia Yusof JC:

This is an appeal against the decision of the learned magistrate Sungai Petani given on 26 February 2001 dismissing the claim of the appellant arising from a road accident involving the appellant who was riding a motor cycle with the respondent's motor car.

At the outset of the hearing of the appeal before me, the respondent put up a preliminary objection on a number of issues which I will deal with accordingly as submitted by the parties.

Firstly, it is contended by the respondent that there are two notices of appeal filed by the appellant which were served on the respondent on 3 March 2001 and 29 March 2001 respectively. In so far as the first notice of appeal is concerned, it is contended by the respondent that this notice is defective in that it is not dated or sealed with the court's seal in contravention of O. 49 of the Subordinate Courts Rules 1980 (hereinafter referred to as the Rules). As for the second notice of appeal it is the respondent's contention that the service of

the second notice on 29 March 2001 is defective in that it was served more than one month after the date of the decision of the learned magistrate given on 26 February 2001. In this respect specifically O. 49 rr. 2 (3) and 2(6) of the Rules has been contravened. Further there was no application for extension of time to file the notice of appeal and as such there is no proper appeal before this court to deal with.

Secondly, the respondent contends that the record of appeal does not contain a sealed copy of the judgment. The undated draft order enclosed in the record of appeal is insufficient for the purposes of the Rules and accordingly the appeal is not properly before this court and this court has no jurisdiction to hear the appeal. It is also contended that the grounds of decision and notes of evidence contained in the appeal record are not confirmed in accordance with s. 76 of the Evidence Act 1950.

Thirdly, the objection of the respondent is aimed at the supplementary appeal record which was filed late and without the leave of the court. Coupled with this, the same was also not served on the appellant and no application was ever made for an extension of time to the court to have the same served on the appellant.

And lastly it was contended by the respondent that there is a contradiction between the notice of appeal and the memorandum of appeal in that while the notice of appeal states that the appeal is against the whole of the decision of the learned magistrate, the memorandum of appeal merely state that the appeal is only confined to the issue of liability of the parties and accordingly this appeal ought to be dismissed.

I shall now deal with each of the contention of the respondent and the submission of the parties and examine them accordingly in the light of the authorities and the principles involved on the points raised.

Defective Notice Of Appeal

In her submission before the court, counsel for the respondent indicated that the first notice of appeal served on the appellant is defective in that it does not indicate the date on which the same was filed. The said notice merely contained the date of the notice of appeal which was 3 March 2001. The notice of appeal on p. 1 of the Appeal Record (encl. 6) which in her submission is the second notice of appeal shows the date of the notice of appeal and the date of filing of the same is indicated as 5 March 2001. However, this second notice was only served on the appellant on 29 March 2001 which is well outside the permitted time under O. 49 r. 2(6) of the Rules which provides:

> The notice of appeal shall be served by the appellant within the time limited for the filing of appeal on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected.

The time for filing a notice of appeal as provided in O. 49 r. 2(3) of the Rules is 14 days from the date on which the decision was pronounced.

In support of her argument before me, learned counsel for the respondent relied on the case of *Lee Lan v. Lim Yoon Loy & Ors* [1991] 3 CLJ 2393; [1991] 1 CLJ (Rep) 251 which held that O. 49 r. 2(6) of the Rules requires the notice of appeal to be served on the parties affected by the appeal within 14 days from the date of the decision and that the notice of appeal must show the date on which it was filed in the court appealed from to show that O. 49 r. 2(3) has been complied with. A notice of appeal serves as a notice to the respondent that an appeal is pending and in the instant case by the service of the first notice of appeal, the respondent is fully informed and made aware of that fact. The respondent is therefore not caught unaware or by surprise and I do not see in what manner he is prejudiced. As a matter of fact the respondent was subsequently served with another notice although out of time. The case of *Lee Lan v. Lim Yoon Long & Ors (supra)* quoted by the learned counsel for the respondent can easily be distinguished from the present appeal because in that case the notice of appeal was never served on the party at all. There was therefore no service of the notice of appeal to bring the appeal into existence.

Reliance was also placed on the authority of *Soh Keng Hian v. American International Assurance Co. Ltd* [1996] 2 CLJ 449 where Gopal Sri Ram JCA said at p. 453:

> We do not intend to dwell upon the rules of court. This order is clear. An appeal is brought to this court by filing and serving the notice of appeal. The one act without the other renders the appeal incompetent. There are scores of authorities on the point commencing from *Gurbachan Singh v. Seagrott & Campbell (No. 2)* [1962] MLJ 370.

It is interesting to note that in the said case, the respondent's solicitors waited for more than two months to be served with the notice of appeal. They were not. The respondent then filed a motion to strike out the appeal and still that did not move the appellant to take any action. It was only three days before the hearing of the respondent's motion to strike out the appeal that the appellant put in his application to have time extended for service of the notice of appeal. The court duly refused the appellant's application. Clearly this case is also easily distinguishable from the case before me now and suffice it to say that the appellant in the present case before me has done both the filing and serving of the notice of appeal.

In reply to the submissions made by counsel for the respondent, learned counsel for the appellant has urged this court to waive the irregularity in the notice of appeal. The function of this court is to do justice and not merely to dispose off cases on the ground of mere technicalities. It is trite that rules are meant to be obeyed by all parties unless they have exceptionally good grounds for non-compliance for which the court may exercise its discretion (*Alor Janggus Soon Seng Trading Sdn. Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [2000] 2 CLJ 473 and *Ratnam v. Cumarasamy & Anor* [1965] 1 MLJ 228) and failure to comply with them will lead to chaos in the conduct of litigation (*Syarikat Telekom Malaysia v. Business Chinese Directory Sdn Bhd* [1994] 2 CLJ 729 per Eusoff Chin SCJ (as he then was)). Be that as it may, this court is at the same time seised of the power and discretion under O. 2 of the Rules of the High Court 1980 to treat the irregularity as not to nullify the proceeding before me. The irregularity in the notice of appeal do not in my view constitute a fundamental defect in procedure and therefore it should be curable. This court is empowered by the said order to cure such irregularities consisting of failure to comply with the rules. Rule 1 should be construed widely and generously to give effect to its manifest intentions, thus, every omission or mistake in practice or procedure is to be regarded as an irregularity which the court can and should rectify so long as it can do so without causing injustice (*Harkness v. Bell's Asbestos and Engineering Ltd* [1976] 2 QB 729). As to how the court should exercise its discretion to rectify this irregularity, I find comfort in citing a passage from the judgment of Augustine Paul JC (as he then was) in the case of *Re CHS* [2001] 8 CLJ 653 where His Lordship referred to what Cumming Bruce LJ said in *Metroinvest Anstalt & Ors v. Commercial Union Assurance Co Plc* [1985] 2 All ER 318 at p. 324:

> I would say that in most cases the way in which the court exercises its power under O. 2 r. 1(2) is likely to depend on whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say the particular failure to comply with the rules. But I would construe O. 2 r. 1(2) as being so framed as to give the court the widest possible power in order to do justice.

The Supreme Court in *Vincent Tan See Yin v. Noone & Co. & Anor* [1995] 2 CLJ 195 speaking of O. 2 r. 1 says at p. 207:

> The power given to the court by O 2 r 1 is a power to cure irregularities consisting of failure to comply with the rules. 'The authorities taken as a whole show that O. 2 r. 1 should be applied liberally in order, so far as reasonable and proper, to prevent injustice being caused to one party by mindless adherence to technicalities in the rules of procedure' (*1 Supreme Court Practice* 1991 at pg. 10)

It follows therefore that only if the irregularity is so fundamental and so serious to the extent that the other party is prejudiced by such irregularity that this court will not invoke its power under the said rule. On the facts and circumstances of the appeal before me, I hold that the irregularity in the instant appeal is not so serious as to have caused prejudice to the respondent and for that reason I hold that the respondent's objection on this ground fails. In the light of the above, the respondent's objection on the ground that no application for extension of time was made to file the second notice of appeal outside the permissible period by the appellant also fails.

Defective Record Of Appeal

The second attack launched by the respondent against the appeal was made on the Record of Appeal in respect of the draft order which was enclosed at pp. 39 and 40 of the Appeal Record (encl. 6). It is the contention of the respondent that the inclusion of the draft order in the appeal record is in contravention of O. 49 r. 3A(1)(d) of the rules citing *Alor Janggus Soon Seng Trading Sdn. Bhd. & Ors v. Seng Hoe Sdn. Bhd. & Ors.* [2000] 2 CLJ 473 as an authority for the proposition that a draft judgment is not a judgment, since a draft implies that it needs perfection and approval and in order to be included in the appeal record, it must be a sealed order and not a draft order.

In *Sii Toh Sing v. Hung Ming Chung* [2000] 2 CLJ 48, Tee Ah Sing J said at p. 54:

> … I am of the view that the word decision in O. 49 r. 6(3)(d) of the SCR could only mean the sealed judgment, that is to say, a judgment that is drawn and endorsed in accordance with O. 29 rr. 9 and 10 of the SCR (*See Teoh Soon Kok t/a TSK Supplies Trading v. MBF Finance Bhd.* [1995] 2 CLJ 130).

In *Mat Yasin bin Dollah v. Ibrahim b. Hussin & Anor* [1997] 2 MLJ 691 His Lordship Nik Hashim JC in p. 684 said:

> Order 49 r. 3A(1) is mandatory in its terms by reason of the word 'shall' in the rule (see *Datuk Bandar Kuala Lumpur v. Seman b. Amat and Other Cases* [1996] 3 CLJ 263). Accordingly, strict compliance with its provision is called for and failure to enclose any one of the items in the record as required by the rule, in my view, will render the appeal record defective. It has been said time and again that rules of courts must be obeyed (*Ratnam v. Cumarasamy & Anor* [1965] 1 MLJ 228) and must be meticulously and faithfully complied with (per Low Hop Bing JC (as he then was) in *S. Ravi a/l G. Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ, 152 at p. 154)." Failure to comply with them will lead to chaos in the conduct of litigation (*Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn. Bhd.* [1994] 2 CLJ 729 per Eusoff Chin SCJ (as he then was)).

> Thus, without the decision and following *Teoh Soon Kok*'s case, I hold that the appeal record in the present case was not properly before the court. The record suffered from a serious defect for not being in compliance with the strict rules of O. 49 r. 3A(1)(d) of the SCR.
>
> I am of the view that O. 49 r. 6(3) of the SCR is mandatory in its terms by reason of the word shall in the rule. So it is a mandatory requirement for the record of appeal to contain the decision appealed from.
>
> …
>
> In the result, the record of appeal without the decision is incomplete. I hold that the record of appeal in the present case was not properly before the court and this court has no jurisdiction to hear this appeal.

I am in agreement with those words and certainly the decision of the High Court is very persuasive. Pausing for a moment, having sieved through the facts of the case before me, I am constrained not to follow that decision and seek to make a distinction on the ground that the sealed copy of the order was never filed in the abovementioned case. The appellant in the case before me, however has filed a supplementary appeal record enclosing the sealed copy of the order. That supplementary appeal record was filed by the appellant on 27 November 2001 (encl. 10) and served on the respondent. The appellant in his submission contended that service was done on the respondent by their letter dated 22 November 2001. The respondent however denies having been served at all with the same. In respect of this supplementary appeal record it is contended by the respondent that the same was filed late and without the leave of the court and they were prejudiced by this fact. It is to be noted that the supplementary appeal record filed on 27 November 2001 contains only the sealed copy of the order and nothing else, and having perused the same and the draft order in the Appeal Record (encl. 6), I fail to see how the appellant has been prejudiced by the said document. The only difference between the two documents seems to be the presence of the court's seal and the registrar's signature on the document in encl. 10 which contains a sealed order of the court. On the fact and circumstances submitted before me, I find that the appellant has taken the necessary steps to remedy the Appeal Record (encl. 6) and this conduct of the appellant bears an important distinction with the situation and the conduct of the appellant in the *Alor Janggus* case. Further, as submitted by learned counsel for the appellant, under Arahan Amalan No. 2 Tahun 1998, there is no necessity to apply for leave to file a supplementary appeal record, and for that matter an appeal record can be filed at the first instance even without the order appealed from. For ease of reference, the said Arahan Amalan No. 2 Tahun 1998 is reproduced in extenso which is as follows:

ARAHAN AMALAN NO. 2 TAHUN 1998
Memasukkan Salinan Penghakiman Dekri atau Perintah Yang Dirayu ke Dalam Rekod Rayuan bagi Rayuan Sivil Di Mahkamah Tinggi

Saya dengan hormatnya diarahkan merujuk kepada perkara di atas.

2. Di bawah peruntukkan Aturan 49 kaedah 3A (1) (d)

Kaedah-Kaedah Mahkamah Rendah 1980, seseorang perayu adalah dikehendaki menyertakan satu salinan penghakiman dekri atau perintah yang hendak dirayu, ke dalam rekod rayuan. Walaubagaimanapun masih terdapat rekod rayuan yang tidak disertakan dengan salinan penghakiman, dekri atau perintah seperti yang dikehendaki oleh kaedah yang disebutkan di atas. Keadaan ini telah menyebabkan kelewatan bagi penetapan kes-kes rayuan di Mahkamah Tinggi.

3. Bagi mengatasi masalah ini dan untuk menyegerakan prosiding rayuan di Mahkamah Tinggi, Y.A.A. Hakim Besar Malaya telah mengarahkan supaya bagi rekod-rekod rayuan yang masih belum disertakan dengan salinan penghakiman, dekri atau perintah, pihak perayu bolehlah sebaik sahaja menerima penghakiman dekri atau perintah termeterai dari Mahkamah Rendah memfailkannya sebagai rekod rayuan tambahan tanpa memfailkan sebarang permohonan.

4. Ini juga bermakna bagi rekod rayuan yang belum difailkan disebabkan ketiadaan penghakiman, dekri atau perintah termeterai maka rekod rayuan berkenaan bolehlah difailkan terlebih dahulu dan amalan di atas hendaklah terpakai apabila perayu telah menerima penghakiman, dekri atau perintah termeterai untuk difailkan sebagai rekod rayuan tambahan.

5. Arahan Amalan ini berkuatkuasa mulai 1 Julai 1998.

On the aforesaid reasons, I find no merit in the respondent's argument in respect of this issue and accordingly hold that the objection raised against the record of appeal and the supplementary appeal record be dismissed.

On the contention that the grounds of decision and the notes of evidence are not in accordance with s. 76 of the Evidence Act 1950, having perused the record of appeal (encl. 6), I am satisfied that s. 76 of the Evidence Act 1950 has been satisfied. The certification on pp. 8 and 28 of encl. 6 in respect of the notes of evidence and the grounds of decision respectively is self explanatory and needs no further elaboration. Such certification is sufficient for the purposes of s. 76 of the Act.

One further point which has been advanced by the respondent as a ground of objection to this appeal is in respect of the contradiction between the notice of appeal and the memorandum of appeal. In the notice of appeal the appellant sought to appeal against the whole of the decision of the learned magistrate while in the memorandum of appeal it appears that only the issue of liability is appealed against as stated in para. 1 at p. 3 of encl. 6. Without elaborating further on the issue, I think in an appeal of this nature, namely on the question of liability in an accident claim, it goes without saying that once the issue of liability is appealed against and if subsequently allowed, certainly the issue of quantum of damages will also be accordingly affected and/or need to be altered. Does it mean that if the issue of quantum is not pleaded in the memorandum of appeal, it cannot be disturbed even if the issue of liability of the parties to the claim is reversed or apportioned accordingly. I think not. The case of *Peggy Mavis Moreira & Anor v. Manivail Parasamy* [2001] 2 CLJ 264 cited by the learned counsel for the respondent is of no avail to support her submission for the simple reason that in that case the notice of appeal is defective and the appeal therefore was not properly before the court. Counsel sought to rely on the said case as an authority to support her view that a contradiction between the notice of appeal and the memorandum of appeal is such a defect that merits the dismissal of the appeal. I do not think that case can support such a proposition. Having considered the nature of the subject matter of the appeal before me, I do not think the contradiction between the notice of appeal and the memorandum of appeal is of such a nature as to cause prejudice to the respondent and as I have stated much earlier under no circumstances at all can the issue of quantum be left untouched or unaffected if the liability of the parties to this appeal is subsequently altered or apportioned by the court. In such a situation, it makes no difference whether the issue of quantum is pleaded or not in the memorandum of appeal for it to be dealt with by this court.

For the reasons adumbrated above, I hold that there is no merit in the preliminary objections raised by the respondent and accordingly dismiss them and the hearing of this appeal shall therefore proceed on the merits of the case.